BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's	)	Gen. Docket 90-314
Rules to Establish New Personal	)	
Communications Services	)	

OPPOSITION/COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION TO THE PETITIONS FOR RECONSIDERATION

Michael F. Altschul
Vice President, General Counsel
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
Two Lafayette Centre, Third Floor
1133 21st Street, N.W.
Washington, D.C. 20036

Philip L. Verveer
Daniel R. Hunter
Jennifer A. Donaldson
Francis M. Buono
WILLKIE FARR & GALLAGHER
Three Lafayette Centre, Suite 600
1155 21st Street, N.W.
Washington, D.C. 20036-3384

Of Counsel

January 3, 1994

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SUMMARY

On reconsideration, the Commission should relax the cellular eligibility and attribution rules to maximize economic efficiencies and consumer welfare. Thus, MCI's proposal requesting more stringent limitations should be denied as MCI offers no compelling pro-competitive reasons for its exclusionary proposal.

Given that 10 MHz of spectrum can provide competitive, viable PCS services, the Commission should also reject petitions such as Time Warner Telecommunications' and others which request 30 and 40 MHz allocations.

Finally, to maximize bidder participation and further the public interest, the Commission should permit all qualified entities to bid for PCS licenses subject to any necessary post-bidding divestiture and impose minimal regulation on the PCS aftermarket.

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OFFICE OF THE SECRETARY

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OPPOSITION/COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION TO THE PETITIONS FOR RECONSIDERATION

The Cellular Telecommunications Industry Association ("CTIA"), by its attorneys, and pursuant to § 1.429(f) of the Commission's rules,[1] respectfully submits its opposition/comments in the above-captioned proceeding.[2] Specifically, CTIA opposes MCI Telecommunications Corporation's Petition for Partial Reconsideration and Clarification ("MCI petition") to the extent it requests that certain cellular carriers be excluded from bidding for one 30 MHz block in all markets; and Time Warner Telecommunications' Petition for Partial Reconsideration ("TWT petition") and other petitions to the extent they request 30 and

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[1] 47 C.F.R. § 1.429(f).

[2] See Personal Communications Services, Second Report and Order in Gen. Docket 90-314, 8 FCC Rcd. 7700 (1993) ("PCS Order").

40 MHz PCS allocations.[3] There are simply no pro-competitive justifications for imposing the exclusionary rule proposed by MCI. Moreover, 30 and 40 MHz allocations are fundamentally inconsistent with well-documented demonstrations that 10 MHz is sufficient to support viable, competitive PCS services. Thus, the Commission should reject such proposals as contrary to the public interest.

CTIA also supports the following proposals raised by various petitioners: (1) to permit all qualified entities to bid for any PCS license subject to subsequent divestiture to effect compliance with eligibility requirements;[4] and (2) to impose minimal regulation on the PCS aftermarket.[5] Such proposals, if adopted on reconsideration, will maximize bidder participation and otherwise further the public interest.

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[3] TWT proposes a 40 MHz allocation, see TWT petition at 3-11, while other petitioners advocate retaining a 30 MHz license. See, e.g., PCS Action Inc. Petition for Reconsideration and Clarification ("PCS Action petition"); Iowa Network Services, Inc. Petition for Reconsideration at 5-11 ("Iowa Network petition"); American Personal Communications Petition for Reconsideration at 1-2 ("APC petition").

[4] See, e.g., McCaw Cellular Communications, Inc. Petition for Reconsideration and Clarification at 5-6 ("McCaw petition"); GTE Service Corporation Petition for Limited Reconsideration or Clarification at 5-7 ("GTE petition").

[5] See BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Cellular Corp. Petition for Reconsideration at 20-22 ("BellSouth petition").

I. THE COMMISSION SHOULD RELAX THE CELLULAR ELIGIBILITY AND ATTRIBUTION STANDARDS, NOT IMPOSE MCI'S MORE STRINGENT EXCLUSIONARY RULE

The record demonstrates that more relaxed cellular eligibility and attribution standards better promote the public interest.[6] Thus, the Commission may raise the overlap threshold to 40% and increase the attribution standard to 30-35% while still adequately protecting against the exercise of undue market power. More relaxed standards will enhance consumer welfare by permitting our society to take maximum advantage of cellular providers' expertise and infrastructure, and thus appropriate the value of existing economies of scope between cellular and PCS services.[7]

The more stringent exclusionary rule proposed by MCI, on the other hand, is merely an attempt to eliminate potential PCS rivals at the consumer's expense. Specifically, MCI proposes that the nine largest cellular carriers and their affiliates should be excluded from bidding for one of the 30 MHz MTA licenses regardless of overlap.[8]

MCI's proposal, which relies upon an economic study prepared by Daniel Kelley in connection with a different proceeding,[9]

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[6] See, e.g., CTIA Petition for Reconsideration at 11-24 ("CTIA petition").

[7] Id.

[8] See MCI petition at 2-5.

[9] See Daniel Kelley, Hatfield Associates, Inc., "Designing PCS Auction Rules to Encourage Competition," Exhibit A to MCI petition (Nov. 10, 1993) ("Kelley auction study").

suffers from an underlying flaw, i.e., that "[c]ellular is not a competitive service."[10] Starting from this highly controverted assumption, MCI leaps to otherwise untenable conclusions, i.e., (1) that the objectives of maximizing competition in the PCS marketplace and of awarding PCS licenses to those entities who value them most are somehow mutually exclusive propositions; and (2) that all geographic markets must be protected from those "dominant" cellular carriers who are large enough to exercise market power.

As CTIA has already demonstrated conclusively in the mobile services regulatory parity proceeding,[11] cellular services perform competitively, i.e., "the business of supplying cellular telephone communications has been characterized by rapidly increasing volume, declining prices, expanded service offerings, and significant technological change."[12] Nothing now offered by MCI or Dr. Kelley[13] demonstrates otherwise. Thus, there is no

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[10] Id. at 7.

[11] See CTIA Comments in GN Docket 93-252 at 30-34 (Nov. 8, 1993); CTIA Reply Comments at 3-10 (Nov. 23, 1993) and cites therein.

[12] See Besen et al., Charles River Associates, "The Cellular Service Industry: Performance and Competition," submitted as an Appendix to CTIA Reply Comments in Gen. Docket 90-314, at 1 (January 1993).

[13] See also Daniel Kelley, Hatfield Associates, Inc., "An Efficient Market Structure for Personal Communications Services," (Sept. 13, 1993) ("Kelley PCS study"). Dr. Kelley's PCS study consists merely of conclusory statements attesting to the non-competitive nature of cellular services. As such, it lacks a persuasive rationale to justify added restraints on cellular participation.

basis for asserting, as does MCI, that certain cellular operators (who may very well value PCS spectrum the most) should be excluded to promote competition. To exclude such potential bidders, even in areas not currently served, will merely ensure that consumers are denied the economies achievable by cellular operators and with no concomitant overriding benefit.[14]

Moreover, MCI cites four additional reasons for supporting its approach, each of which is equally flawed: (1) that incumbent cellular providers have a "substantial competitive advantage" in being exempted from renewal auctions; (2) that the wireless services market has "'national characteristics'" and that the largest cellular operators "often jointly plan and cooperate with one another, which inevitably leads to less competition in local markets;" (3) that the largest cellular carriers "have a much lower 'hurdle rate'" to bid for PCS licenses than newer entities; thus, without restrictions, such providers will get all of the PCS-allotted spectrum; and (4) "the nine largest cellular providers have at least an incentive to collude tacitly in bidding on the two 30 MHz bands to eliminate new competition."[15] CTIA addresses each of these arguments in turn.

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[14] See Besen and Burnett, Charles River Associates, "An Antitrust Analysis of the Market for Mobile Telecommunications Services," submitted as Appendix A to CTIA's petition, at 55-56 (Dec. 8, 1993) ("Besen and Burnett").

[15] MCI petition at 4-5.

MCI's statement that cellular operators are substantially advantaged by not having to bid for current cellular spectrum appears to be based upon the tenuous assumption that cellular operators will be able to devote significant portions of their cellular spectrum to PCS services.[16] MCI does not factor into its assessment that cellular operators need all 25 MHz of their spectrum simply to meet the growing needs of both current and new users of cellular communications. In many major urban markets, cellular systems are operating at or near capacity with penetration rates of only 3%.[17]

Moreover, cellular operators' continuing obligations to serve their analog subscribers prevent them from immediately implementing more spectrum-efficient digital services. Such obligations also serve to decrease the effective capacity these operators may devote to PCS services on their cellular spectrum. Even under the most optimistic scenario, cellular carriers will have at best 5 MHz of spectrum and at worst no excess spectrum

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[16] MCI obviously ignores the series of "private auctions" which characterized the cellular licensing process. The Commission's use of lotteries to award cellular licenses encouraged numerous speculators who subsequently sold out to the highest bidder in aftermarket transactions. See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 248 (1993) (The FCC's cellular lottery system enabled "many lottery winners subsequently to sell their licenses, sometimes at substantial sums, to legitimate parties who actually built the cellular system"). For example, McCaw, the nation's largest cellular carrier, had to acquire all of its properties in highly-leveraged transactions.

[17] See CTIA Comments in Gen. Docket 90-314 at Appendix B (Nov. 9, 1992) ("CTIA PCS comments"); CTIA Reply Comments at 25-28 (Jan. 8, 1993) ("CTIA PCS reply comments").

for PCS-type services.[18] Thus, the "substantial competitive advantage" claimed by MCI is, in fact, illusory.

MCI's claim that the wireless services market has "'national characteristics,'" and that the largest cellular providers have a pattern of joint planning and cooperation to the detriment of local competition[19] also misses the point.[20] MCI apparently purports that cellular carriers have the ability to block a national network. Yet, nowhere in MCI's pleading nor in Dr. Kelley's supportive study is there an assertion that the top nine cellular carriers, much less any individual carrier, possess market power in a national market. In fact, there is no showing at all that the relevant geographic market is national. Moreover, even if there is a national market, the presence of at least nine firms makes the exercise of market power by a single firm unlikely.[21] MCI merely assumes that cellular operators

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[18] See CTIA PCS comments at Appendix B; CTIA PCS reply comments at 25-28.

[19] See MCI petition at 4-5.

[20] MCI apparently forgets that under federal antitrust laws, cellular service providers are no more free to engage in anticompetitive conduct than are interexchange carriers ("IXCs") or any other competitive industries. In fact, there is no evidence that cellular operators do engage in anticompetitive conduct. See Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order in CC Docket 91-34, 7 FCC Rcd. 4028, note 20 (1992) ("[T]here is no indication that anticompetitive conduct is occurring" in the cellular service market). Moreover, MCI conveniently ignores that IXCs have a similar pattern of joint planning and cooperation limited (as in the case of cellular) to permissive activities that provide standardized protocol interfaces for customers, equipment vendors and other interconnecting communications networks.

[21] In fact, there are more than 400 cellular licensees.

would engage in predatory investments, i.e., acquire spectrum for sub-optimal use to ensure that competitors are denied the opportunity to develop new services, with no prerequisite proof of national market power. In so doing, MCI seems to ignore the fact that predatory investment, even if possible, is highly unlikely considering that no firm, except perhaps an outright monopolist, is likely to engage in such behavior profitably.[22]

MCI also fails to support a claim that the top nine could collude to block the national market. As demonstrated conclusively by Besen and Burnett, the mobile telecommunications services marketplace contains many characteristics which make collusion highly unlikely.[23] Reaching a consensus among nine firms on which of the thousands of possible spectrum combinations to acquire and which to forego would be exponentially more difficult than arriving at a consensus on price. Dr. Kelley acknowledges this in his discussion of national coalitions.[24] MCI's blanket assertions otherwise, without proof, are nothing more than unsupported accusations from a potential competitor placing its own self interest ahead of the consumer's.

MCI's request to exclude the top nine cellular carriers from bidding on the 30 MHz license may result in an artificial output

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[22] See III Areeda and Turner, Antitrust Law, ¶ 718 (1978).

[23] See Besen and Burnett at 49-55.

[24] See Kelly PCS study, at 27 ("One of the problems with forming a coalition to create a national approach (either through agreements or acquisitions) is that '...when some, but not all, players form a coalition, the non-cooperating market participant gets the highest game 'payoff.''") (citations omitted).

restriction. As recognized by prominent antitrust commentators, though, any output limitation imposed on a firm to prevent predatory behavior should be applied, if ever, only in the case of monopoly,[25] a situation even MCI impliedly admits would not be present here when it predicts that there will be at least nine substantial mobile services providers.

MCI also complains that because the top nine cellular operators have such low hurdle rates, that in the absence of restrictions, these operators will end up with all of the spectrum. Surely MCI, which recently negotiated an infusion of capital from British Telecom, cannot be suggesting that it will have a hard time raising capital to bid for PCS spectrum. Surely MCI does not suggest that only the top nine cellular operators have excellent debt ratings.[26] As noted in the Kelley study, the entry of a third cellular provider in the Los Angeles market is predicted to permit that new entrant to "earn substantial profits."[27] If this prediction is accurate, the same is undoubtedly true for other markets. While imperfections in the capital market are possible, MCI must assume a totally frozen capital market if it actually believes that an entrepreneur with such potential profits would be denied reasonable access to adequate funding.

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[25] See Areeda and HovemKamp, Antitrust Law ¶ 714.4 (1993 Supp.).

[26] See Kelley auction study, at 10.

[27] Id. at 9.

Finally, MCI complains about the top nine's "incentive to collude tacitly" to eliminate new competitors.[28] Apparently MCI equates "incentive" with "ability," yet ability has not been demonstrated. Moreover, if the Commission excludes bidders based upon MCI's version of "incentives," then the list will necessarily be longer than the top nine cellular carriers, with MCI and all other profit maximizing firms on the list.[29]

MCI simply fails on all counts to justify its proposal for additional restrictions on cellular participation. Its petition should be denied.

II. THE COMMISSION SHOULD REJECT PETITIONS ADVOCATING 30 AND 40 MHz PCS LICENSES IN LIGHT OF THE VIABLE, COMPETITIVE OPPORTUNITIES PRESENTED BY 10 MHz ALLOCATIONS

Throughout the PCS proceeding, CTIA has consistently advocated a modular approach to PCS licensing which starts small and permits aggregation or disaggregation to design efficient PCS services.[30] Because the record demonstrates that 10 MHz permits operations of minimum efficient scale, i.e., viable, competitive

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[28] MCI petition at 5 (emphasis added).

[29] MCI's notion that there exists an "incentive to collude tacitly" is incorrect. If such were the case, then would not MCI have the same "incentive to collude tacitly" with AT&T and Sprint, which combined control 93.71% of the IXC toll market? See FCC Public Notice, "Revised Compensation Obligations for Interexchange Carriers Required to Pay Compensation to Competitive Payphone Providers," CC Docket 91-35, DA 93-1548 (rel. Dec. 28, 1993) (AT&T has 65.39% of toll revenues while MCI has 17.90% and Sprint has 10.42%).

[30] See CTIA PCS comments at 28-34; CTIA PCS reply comments at 4-8.

PCS services can be provided with 10 MHz of spectrum,[31] CTIA submits that PCS should be licensed based upon 10 MHz building blocks. In recognition, though, of the potential broadband PCS applications and the potential short-term encumbrance of the PCS-allocated spectrum, CTIA also supports 20 MHz allocations. Thus, CTIA's proposal allocates four 20 MHz blocks and four 10 MHz blocks using a BTA-only service area scheme.

To the extent that PCS evolves to the point where additional spectrum is necessary to support various applications, spectrum aggregation will ensure that such services can be introduced. Thus, "the flexibility needed to accommodate to varying outcomes, depending on how a multitude of uncertainties is resolved, can best be achieved by erring in the direction of issuing too many, rather than too few, licenses."[32] Any government attempts, then, at the outset to outguess the market will create no real benefits to consumers but instead pose a distinct threat that 30 and 40 MHz license holders will receive a windfall of more spectrum than they will be able to utilize at the expense of increased competition and competitors.

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[31] See, e.g., PCS Order at 7725-7726; Qualcomm Request for Pioneer's Preference in Gen. Docket 90-314, Appendix A at 6 (1992) (with CDMA technology and 1.25 MHz of spectrum, Qualcomm can provide capacity equivalent to an analog cellular system using 25 MHz) ("Qualcomm request"); Nextel Petition for Reconsideration at 7 ("Nextel petition").

[32] See Leland L. Johnson, "Spectrum Auctions and Personal Communications Services," at 5 (May 3, 1993).

For these reasons, requests for 30 and 40 MHz allocations should be rejected as inefficient utilizations of spectrum.[33] TWT's petition argues that a 40 MHz allocation is necessary to compensate for encumbered spectrum.[34] Notably, TWT does not even address, much less dispute, the Commission's finding that in the bands below 2 GHz a PCS licensee could receive adequate clear spectrum with a 20 MHz allocation.[35] Moreover, TWT fails to properly acknowledge that spectrum encumbrance is only a temporary problem as relocation is scheduled to occur under the Commission's three year reaccommodation plan.[36] In short, TWT does not adequately explain its need for such a spectrum windfall. Without more, TWT's arguments are unpersuasive.

Similarly, PCS Action advocates 30 MHz blocks.[37] For the reasons detailed above, an initial 30-MHz block allocation is inefficient and should be rejected. But, PCS Action also proposes license partitioning in the lower band to permit

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[33] See, e.g., TWT petition at 3-11; PCS Action petition; Iowa Network petition at 5-11; APC petition at 1-2.

[34] See TWT petition at 5-6.

[35] See PCS Order at 7726-7727 and note 57. The APC study that the Commission relies upon for this statement demonstrates that even without microwave relocation, all 20 MHz licensees would have access to at least 10 MHz -- minimum efficient scale. Id. Moreover, Iowa Network, in its petition advocating 30 MHz spectrum blocks, also acknowledges that a 20 MHz allocation in the below 2-GHz band will still yield 10-15 MHz of spectrum even without relocation. See Iowa Network petition at 8.

[36] See New Telecommunications Technologies, Third Report and Order and Memorandum Opinion and Order in ET Docket 92-9, 8 FCC Rcd. 6589, 6589-6590 (1993).

[37] See PCS Action petition at 6.

aggregations up to the 40 MHz limit. CTIA agrees with PCS Action that under the Commission's allocation scheme, relocating microwave incumbents would be more difficult, time-consuming and expensive, and that the need for dual-band equipment would be potentially greater.[38] PCS Action's solution, though, is merely to permit partial aggregation of lower band PCS licenses; significantly, it does not address the underlying problem necessitating partial aggregations.[39]

CTIA submits that the better solution is to address these technical issues through refinement of the allocation plan, thereby reducing the need for numerous additional aftermarket transactions. As CTIA demonstrated in its petition, a 20-10 allocation scheme will facilitate negotiations with microwave incumbents and create more opportunities to aggregate up to 40 MHz in the same band, thus permitting those who desire these larger aggregations to avoid the complexity and added expense of dual-mode phones.[40] By adopting CTIA's proposed 20-10 allocation scheme, PCS Action's technical and interference concerns would be alleviated, and with ultimately lower transaction costs.

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[38] See id. at 6-8; see also CTIA petition at 5-7.

[39] In principle, CTIA supports the concept of license partitioning and aggregation. See Section III, infra.

[40] CTIA petition at 6-7.

III. THE COMMISSION SHOULD PERMIT ALL QUALIFIED ENTITIES TO BID FOR PCS LICENSES SUBJECT TO DIVESTITURE AND IMPOSE MINIMAL REGULATION ON THE PCS AFTERMARKET

CTIA also supports proposals raised by several petitioners that are designed to ensure an efficient, competitive PCS service. Specifically, all qualified entities should be eligible to bid for PCS licenses subject to divestiture to effect compliance with eligibility or attribution rules,[41] and the PCS aftermarket should be subject to minimal regulation.[42]

CTIA already noted in the spectrum auction proceeding that the auction process should be designed to maximize participation of all eligible bidders, and that Commission precedent permits all eligible entities to bid subject to divestiture.[43] McCaw and GTE now illustrate the deleterious consequences resulting if cellular companies are forced to comply with eligibility and attribution rules prior to submitting bids. For example, cellular carriers would be forced to divest their cellular interests merely for the opportunity to submit a bid (which might not even win). Moreover, the values of such cellular interests could be artificially and substantially depressed if a sufficient number of systems were divested simultaneously. Such

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[41] See McCaw petition at 5-6; GTE petition at 5-7.

[42] See BellSouth petition at 20-22.

[43] See CTIA Reply Comments in PP Docket 93-253 at 2-3 (Nov. 30, 1993) ("CTIA auction reply comments"); CTIA petition at note 31. CTIA also noted in the auctions proceeding that permitting full cellular participation at the bidding stage would be consistent with the Commission's recognition of the unique expertise and economies of scope cellular providers bring to the PCS marketplace. See CTIA auction reply comments at 3.

consequences would be in direct contravention of the Commission's analogous policy of avoiding "fire sales" when its cross-ownership rules require divestiture of overlapping interests.[44]

In addition, there are no overriding pro-competitive justifications that would justify such harmful consequences, i.e., cellular operators are in no position to engage in unfair competition prior to receipt of the license.[45] Thus, the Commission should effect compliance with its eligibility and attribution rules by requiring any necessary divestitures only after the submission of successful bids.

The Commission also should exercise its Section 1071 authority and issue tax certificates to cellular operators required to divest their interests. Moreover, such certificates should be available in the event that a cellular operator elects to divest its cellular interest before the auction or is required by the eligibility and attribution rules to divest its cellular interest after submitting a winning bid.[46]

To ensure that market forces drive efficient PCS offerings, the Commission should refrain from over-regulating the PCS aftermarket including the imposition of stringent restrictions on the free transferability of PCS licenses. The Commission itself recognizes that "an outright prohibition on transfer, even for a

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[44] See McCaw petition at 5-6; GTE petition at 5-7.

[45] Id.

[46] See CTIA Comments in PP Docket 93-253, at note 24 (Nov. 10, 1993); see also GTE petition at 8-11; Comcast Corporation Petition for Reconsideration at 16-18.

limited time such as one year, may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing service to the public expeditiously."[47] Thus, to ensure that PCS is available to the public with minimal delay, the Commission should refrain from imposing generic anti-trafficking restrictions.[48]

Moreover, as CTIA has long advocated,[49] the Commission should permit PCS license partitioning and aggregation to increase spectral efficiencies. Such actions will ensure that spectrum is put to its most-valued use as quickly as possible, to the ultimate benefit of the consumer.[50]

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[47] See Competitive Bidding, Notice of Proposed Rule Making in PP Docket 93-253, 8 FCC Rcd. 7635, 7649 (1993).

[48] CTIA's petition acknowledges that unjust enrichment may present a problem in the context of designated entity bidding, and that some restrictions may be necessary regarding subsequent transfers of these licenses. See CTIA petition at note 3; Cf., BellSouth petition at 22 (FCC "should not adopt holding periods or other regulations intended to prevent 'trafficking'").

[49] See CTIA PCS comments at 23-28; CTIA PCS reply comments at 14-16; CTIA petition at note 31.

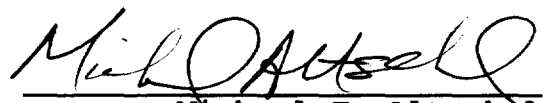
[50] See BellSouth petition at 21-22 ("The Commission should also adopt rules facilitating the partial assignment of licenses, through the subdivision of frequency blocks or service areas.") Numerous other petitioners favor license partitioning. See, e.g., TWT petition at 10-11; PCS Action petition at 9-13; National Telephone Cooperative Association Petition for Reconsideration and Clarification at 1-8; Alliance of Rural Area Telephone and Cellular Service Providers Petition for Reconsideration at 1-5.

CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission deny: (1) MCI's petition to the extent it requests exclusion of cellular carrier participation in PCS; and (2) TWT's petition and other petitions to the extent they request 30 or 40 MHz allocations. CTIA also requests that the Commission: (1) permit all qualified entities to bid for any PCS licenses subject to post-auction divestiture to effect compliance with eligibility requirements; and (2) impose minimal regulation upon the PCS aftermarket.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION



Michael F. Altschul
Vice President, General Counsel
Two Lafayette Centre, Third Floor
1133 21st Street, N.W.
Washington, D.C. 20036

Philip L. Verveer
Daniel R. Hunter
Jennifer A. Donaldson
Francis M. Buono
WILLKIE FARR & GALLAGHER
Three Lafayette Centre, Suite 600
1155 21st Street, N.W.
Washington, D.C. 20036-3384

Of Counsel

January 3, 1994

CERTIFICATE OF SERVICE

I, Jennifer A. Donaldson, hereby certify that I have this 3rd day of January, 1994, caused to be mailed, by first class mail, postage prepaid, a copy of the Opposition/Comments of the Cellular Telecommunications Industry Association to the Petitions for Reconsideration to the following:

Larry A. Blosser
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

David Cosson, Esq.
National Telephone Cooperative
Association
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

James U. Troup
Iowa Network Services, Inc.
1801 K Street, N.W., Suite 400K
Washington, D.C. 20006

Kathy L. Shobert
Director, Federal Regulatory Affairs
General Communication, Inc.
888 16th St., N.W., Suite 600
Washington, D.C. 20006

Paul R. Schwedler
Carl Wayne Smith
Chief Regulatory Counsel
Telecommunications (DOD)
Code AR
Defense Information Systems Agency
701 S. Courthouse Road
Arlington, Virginia 22204

Matthew L. Dosch
Lisa M. Zaina
OPASTCO
21 Dupont Circle, N.W.
Suite 700
Washington, D.C. 20036

Henry M. Rivera
Larry S. Solomon
Ginsburg, Feldman & Bress, Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Catherine Wang
Margaret M. Charles
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

John Hearne, Chairman
Point Communications Company
100 Wilshire Blvd., Suite 1000
Santa Monica, CA 90401

George E. Murray
Carl W. Northrop
Bryan Cave
700 13th Street, N.W.
Suite 700
Washington, D.C. 20005

Jay C. Keithley
Leon Kestenbaum
Sprint Corporation
1850 M Street, N.W.
Suite 1100
Washington, D.C. 20036

Robert E. Sigmon
Vice President-Regulatory Affairs
Cincinnati Bell Telephone Co.
201 East Fourth Street
Cincinnati, OH 45201

J. Barclay Jones
Vice President, Engineering
American Personal Communications
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Wayne V. Black
Keller and Heckman
1001 G Street
Suite 500 West
Washington, D.C. 20001

James F. Lovette
Apple Computer, Inc.
One Infinite Loop, MS:301-4J
Cupertino, CA 95014

Michael D. Kennedy
Stuart E. Overby
Motorola, Inc.
1350 I Street, N.W., Suite 400
Washington, D.C. 20005

M. John Bowen, Jr.
John W. Hunter
McNair & Sanford, P.A.
1155 Fifteenth Street, N.W.
Washington, D.C. 20005

Francine J. Berry
American Telephone and Telegraph Co.
Room 3244J1
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Ronald L. Plesser
Piper & Marbury
1200 Nineteenth Street, N.W.
Seventh Floor
Washington, D.C. 20036

Chandos A. Rypinski
Lace, Inc.
655 Redwood Highway #340
Mill Valley, CA 94941

W. Scott McCollough
Office of the Attorney General
State of Texas
P. O. Box 12548
300 W. 15th St., 7th Floor
Austin, Texas 78711-2548

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

James L. Wurtz
Pacific Bell
Nevada Bell
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Brian D. Kidney
Pamela J. Riley
PacTel Corporation
2999 Oak Rd., M.S. 1050
Walnut Creek, CA 94596

Stuart F. Feldstein
Richard Rubin
Steven N. Teplitz
Fleischman and Walsh
1400 16th Street, N.W.
Washington, D.C. 20036

R. Michael Senkowski
Robert J. Butler
Suzanne Yelen
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20036

Thomas A. Stroup
Mark Golden
Telocator
1019 19th Street, N.W.
Suite 1100
Washington, D.C. 20036

John A. Prendergast
Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037

Edward R. Wholl
Nynex Corporation
120 Bloomingdale Road
White Plains, NY 10605

Charles P. Featherstun
BellSouth Corporation
1133 21st Street, N.W.
Suite 900
Washington, D.C. 20036

Leonard J. Kennedy
Laura H. Phillips
Richard S. Denning
Dow, Lohnes & Alberston
1255 23rd Street, N.W.
Washington, D.C. 20037

Frank Michael Panek
Ameritech
2000 West Ameritech Center Dr.
Hoffman Estates, Illinois 60196

Jeffrey S. Bork
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

David C. Jatlow
Young & Jatlow
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037

R. Michael Senkowski
Eric W. DeSilva
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20554

James E. Meyers
Susan R. Athari
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

James D. Ellis
Paula J. Fulks
175 E. Houston, R. 1218
San Antonio, TX 78205

David L. Nace
Lukas, McGowan, Nace &
Gutierrez, Chartered
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006

Jeffrey L. Sheldon
Sean A. Stokes
Utilities Telecommunications
Council
1140 Connecticut Ave., N.W.
Suite 1140
Washington, D.C. 20036